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Ed Welch On Workers' Compensation

Defining "Disability": The Approach to Follow

by Theodore J. St. Antoine

The definition of "disability" has once again become a central issue in workers' compensation law. I am partly responsible. A decade ago I served as the Governor's Special Counselor on Workers' Compensation. In my Report to the Cabinet Council on Jobs and Economic Development, I stated: "If I could write on a clean slate, I would prefer to see the Michigan definition brought even closer into the mainstream of American law by declaring that 'disability' means a 'limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease.'" T. St. Antoine, *Workers' Compensation in Michigan: Costs, Benefits, and Fairness*, 27 (1984).

Since the Michigan Legislature had gone through an arduous struggle as recently as 1981 to define "disability" for the first time with regard to personal injury, I recommended against any further tinkering right then with the new statutory definition. I also thought the change would "probably be of small practical consequence." *Ibid.* Despite that admonition, the Legislature proceeded in 1987 to adopt my "cleanslate" phraseology verbatim and incorporate it into Section 418.301(4) of the act.

My proposed language was based on the definition in the classic treatise of the late Arthur Larson, acknowledged as the country's foremost authority on workers' compensation law. As I said in my Report, the effect of the change would be to substitute Larson's formulation, "work suitable to claimant's qualifications and training,"

for the 1981 language referring to the "employee's general field of employment." The difference was to shift attention from the kind of work an employee was in fact doing to the kind of work the employee was qualified to do. But there was no change, proposed or enacted, in the preexisting language of Section 418.301(4) that "disability" meant "a limitation of an employee's wage earning capacity. . ." (emphasis supplied).

In drafting a statute, one should not be so presumptuous as to think that all conceivable cases and issues to arise in the future can be anticipated and resolved in advance. But at least one can lay down some general guidelines and provide some sense of the approach to be followed in interpreting and applying a new statutory provision. The clearly stated purpose of my proposed language, which the Legislature adopted exactly as I suggested, was to bring the Michigan definition of "disability" closer into the "mainstream of American law" by substituting Professor Larson's phraseology for that of the 1981 legislation. Larson's own summation of the main body of compensation doctrine is therefore the surest guide to the proper interpretation of the 1987 amendment.

Moreover, as I emphasized in my 1984 Report, even the Legislature's original 1981 definition of "disability," with its reference to "a limitation of an employee's wage earning capacity in the employee's general field of employment" (emphasis supplied), was designed to rid the Michigan system of a judge-imposed notion that "disability" meant an "inability to do the work

the claimant was doing at the time of injury." St. Antoine, *supra*, at 23-24, 27. That led to "freakish" results, to use Arthur Larson's term. An example was the case of the skilled coal miner who was so badly burned in a mine explosion that he could not stand exposure to summer heat or winter cold, but who was held to have no permanent disability at all because he could resume his work in the relatively constant temperatures underground (until the mine closed for economic reasons). *Kaarto v Calumet & Hecla, Inc.*, 367 Mich 128 (1962).

In addition, I emphasized that the only way to achieve a dramatic reduction in eligibility for wage loss benefits by a change in the definition of "disability" would be through the sort of extremely strict definition employed in Social Security disability determinations. St. Antoine, *supra*, at 27-28, citing 42 USC § 423 (d)(2)(A). The Legislature obviously did not pursue that course in amending Section 418.301(4). In contrast, it did impose a far stricter standard of disability in Section 418.373 to disqualify persons receiving nondisability pensions or retirement benefits ("unable . . . to perform work suitable to the employee's qualifications . . .") (emphasis supplied).

The current dispute over "disability" under Section 418.301(4) pits two opposing views against each other. One position is that it requires "only a limitation, not total limitation, of wage-earning capacity in work suitable to qualifications and training" (emphasis in the original). *Harris v United Tech-*

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nologies, 1989 ACO #222, 1989 ACO 1087, ¶12 MIWCLR 1190 (1989). The other view is that the "relevant inquiry" is "whether the plaintiff has the ability to work at any other type of job by virtue of his or her qualifications and training" (emphasis supplied), *Hooker v US Mfg.*, 1992 ACO #346, 1992 Mich ACO 1053, ¶15 MIWCLR 1275 (1992), and "if an employee is found able to do any of those jobs, the employee cannot be found to be disabled" (emphasis supplied), *Paquin v AZCO-Hennes*, 1992 ACO #364, 1992 Mich ACO 1112, ¶15 MIWCLR 1292 (1992).

Understandably, employers are concerned that under the first analysis, workers' compensation could become a high-benefit form of unemployment compensation, especially in periods of recession. But this is what Arthur Larson has to say: "[An] injured claimant may honestly represent to the Employment Security office that he is able to do some work, and with equal honesty tell the Compensation Board later that he was totally disabled during the same period since, although he could have done some kinds of work, no one would give him a job because of his physical handicaps" (emphasis supplied). 1CA. Larson, *The Law of Workmen's Compensation* § 57.65, p. 10-492.50 (1993).

Even more to the point, Larson repeatedly cites *USF&G Ins. Co. v. Giles*, 340 SE 2d 284 (Ga App 1986), as "briskly" handling a problem that has troubled such a major wage-loss state as Florida. See Larson, *supra*, § 57.22(c), p. 10-189. In *Giles*, an employee resigned his job as claims adjuster for USF&G after suffering a car accident on the job and took a similar position with CNA. Later the employee was laid off by CNA because of a

reduction in force. Giles had experience as a construction worker and athletic coach, and could have obtained such employment but for his work-related injury. The court sustained a finding of total disability. Larson quotes the court as follows: "It is not the ability to perform the particular job in which one is engaged at the time of injury which is the determining factor in a case such as this, but rather whether the claimant's inability to find any work for which he is suited by training and experience is a result of the injury suffered" (emphasis in the original).

Speaking generally, Larson observes: "It is uniformly held. . . , without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those received before the accident." Larson, *supra*, § 57.21(c), p. 10-136. This analysis is wholly in keeping with the plain wording of Section 418.301(4), which speaks of disability as "a" limitation on wage-earning capacity, not as the total elimination of that capacity.

Thus, it should follow that if an employee is qualified to do three jobs, and a work-related injury prevents her from doing one of them, she has a "disability," even though she remains quite capable of performing the other two. *Hooker* and *Paquin*, cited above, are of course to the contrary. (The recent Court of Appeals decision in *Sobotka v Chrysler Corp.* (No. 139559, 3/11/93) is not necessarily in conflict, since it deals with a pre-1982 injury, before there was any applicable statutory definition of "disability.")

Naturally, the set-off provisions of Sections 418.301(5)(b), 418.361(1), and 418.371(1) provide for appropriate deductions from the compensation otherwise due an injured employee who is able to obtain gainful employment in spite of his injury. Similarly, Section 418.301(5)(a) disqualifies an

employee from wage loss benefits for refusing "a bona fide offer of reasonable employment . . . without good and reasonable cause." But that does not affect the threshold question of whether there was a disability.

My conclusion, then, is simple. The answer to the vexing issue of disability ought not to turn on the accident of political partisanship. It should depend on a conscientious, reasoned effort to discern the "mainstream of American law." That will usually be best elucidated in the authoritative treatise by Arthur Larson.

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One Panel Offers Opinion

Since the above article by Professor St. Antoine was written, one panel of the court of appeals has agreed with his position. In *Fraley v General Motors Corp.*, ___ Mich App ___, ___ N.W.2d ___, 5 MIWCLR ___ (No. 128176, 4/6/92), a panel offered the opinion that a worker is "disabled" if there is a limitation on the ability to do work suitable to his or her qualifications and training. He or she need not be disabled from all such work.

The holding in this case, however, was "dicta" because it was not necessary for a decision. Following *Turrentine* (see "'87 Definition of Disability Not Retroactive," on page 61), the court held that the 1987 definition did not apply because the injury occurred before May 14, 1993. Panels of the appellate commission have split on this issue.